78

Office - Supreme Court, U. S.
FILED
JAN 26 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 457

NATHAN CHIARELLI and SAM SERRITELLA,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

WM. SCOTT STEWART,
Chicago Temple,
Chicago 2, Illinois,

LOUIS J. GILIBERTO,
134 N. La Salle Street,
Chicago 2, Illinois,
Counsel for Petitioners.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-9543

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 457

NATHAN CHIARELLI and SAM SERRITELLA,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

We did not reply to the Brief of the Government in opposition to our Petition For Certiorari and we feel that there are certain points which may have been overlooked and should be emphasized.

Defendants were arrested without warrant, waived trial by the jury, and were convicted on three counts, charged with violation:

I. 26 U.S.C. 2553 (a) (Purchase of Narcotics) (tr. 2).

II. 21 U.S.C. 174 (fraudulently and knowingly receiving and transporting narcotics) (tr. 3).

III. 18 U.S.C. 371 (conspiracy based on the first two counts) (tr. 3). A reversal of Counts I and II would result in a reversal of Count III charging the conspiracy.

We contend that the Government failed to prove venue of the purchase of the drugs under the first count and that the case of *Casey* v. *United States,* 276 U.S. 413 does not in any way eliminate the necessity to prove venue as we wish to point out later. We also wish to pay particular attention to the Government's case which is based upon the evidence concerning the flight of the defendant, Serritella, and the attempted flight of the defendant, Chiarelli.

We respectfully submit that without the aid of the presumptions, which we contend were erroneously applied, the Appeals Court could not, on the basis of the evidence presented affirm the decision of the District Court.

VENUE.

In regards to venue, under Count I, a violation of 26 U.S.C. 2553 (a) the lower Courts held that under the statutes two *presumptions of law* arose therein:

1. Presumption of a purchase.

2. Presumption of venue

citing *Casey* v. *U.S., supra,* in support of their contention as to venue. During the trial of the case at Bar, no evidence whatever of any kind as to the defendants' movements prior to their arrest nor to any acts or movements on defendants part to indicate a purchase *or an inference* of a purchase was presented.

Our contention is that the lower Courts erred in holding that there were two *presumptions of law* arising out of

Statute, *supra*. The Courts have consistently held that a presumption cannot be based upon a presumption.

Manning v. *Insurance Company*, 100 U.S. 693;
Cunard S.S. Co. v. *Kelley*, 126 Fed. 610;
C. M. & St. P. Rwy. v. *Coogan*, 271 U.S. 473;
31 C.J.S. Sec. 116B, Page 727 and cases cited.

We further contend that the *Casey* case, *supra*, does not state that two *presumptions of law* arose from the Statute in Count I but: (1) that a *presumption of law* arose as to purchase of drug (2) that a *presumption of fact* arose as to venue. We find that the Court referred to a second type of prima facie evidence in the *Casey* case, *supra*, in that the Court said on page 418:

> "The Statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the Statute creates, 4 Wigmore Evidence 2494."

So we can see that the Court had in mind a second type of prima facie evidence noted in 4 Wigmore Evidence, Sec. 2494, in which the two types of prima facie evidence are set out as follows:

1. That type of prima facie evidence which creates a presumption at law and which is controlling upon the judge and jury.

2. That type of prima facie evidence which creates a presumption of fact which merely means evidence sufficient in quantity for the jury to consider.

We believe the Court relied upon the second type of prima facie evidence from further reading from the *Casey* case, *supra*, on pages 417, 418:

> "But we are of the opinion that upon the facts of this case the court was right. *If the Jury believed the*

> *defendant, long established in Seattle, said that he had not the drug, but would and shortly thereafter did, furnish it* (Italics ours), the inference that he bought it in Seattle is strong."

Under this line of reasoning it is plain that the Court was relying not upon a presumption of law but upon a presumption of fact and it is comparable to the prima facie evidence which we have cited, Wigmore, *supra,* Sec. 2494 (2), pertaining to presumption of fact whereby it is merely evidence to be considered by the Judge or Jury. We also contend that the Court in the *Casey* case, *supra,* relied on the fact that the evidence showed that shortly before his arrest Casey was asked to furnish the witnesses with the drug, and answered that he did not have any on his person, but that he would be back shortly; and that shortly thereafter he produced the drugs. Based upon the fact that Casey could not have gone outside the city of Seattle in such a short time, a presumption of fact arose.

However in the case at Bar, there was no evidence concerning the defendants immediately prior to their arrest so that an inference or a presumption of fact as to the venue could arise. The purchase might have been made in Missouri, or anywhere beyond the Court's jurisdiction.

We therefore contend that the presumption or prima facie evidence as to venue in the *Casey* case, *supra,* is not a presumption of law, but a presumption of fact. And on presumptions of fact we cite 4 Wigmore 2491. "They are in truth but mere arguments, and depend on their own natural force and efficacy in generating belief or conviction in the mind" * * * "the jury may give to them whatever force or weight it thinks best—just as it may to other evidence."

Therefore, being a presumption of fact it does not of itself, as a presumption of law would, supply venue unless

supported by evidence, and which evidence must meet the tests imposed upon evidence of any kind, in a criminal case, that is, proof beyond a reasonable doubt. We also wish Your Honors to note that under 26 U.S.C.A. 2554; *U.S.* v. *Jones,* 174 Fed. 2nd 745, regarding the sale of narcotics, the Court held that venue had to be proven; that under no other statute do the Courts give the construction which the lower Courts would place upon Sec. 2553 (a). We believe that if such a construction is placed upon it it is against the Sixth Amendment to the Constitution. We contend therefore that venue must be proved. *Brightman* v. *U.S.,* 7 Fed. 2nd 532; *DeMoss* v. *U.S.,* 14 Fed. 2nd 1021; *Cain* v. *U.S.,* 12 Fed. 2nd 580, and that in the case at bar venue as to purchase under Count I was not proven.

EVIDENCE OF FLIGHT.

The evidence surrounding the flight of the defendants[1] as given by the Government witnesses[2] is as follows:

1. The arresting officers were not in police uniform (tr. 12).
2. The police car did not bear any marking to identify it as a police car (tr. 11).
3. The police car used by the City of Chicago police belonged to Officer Wallace personally (tr. 11).
4. The Chicago police identified themselves under most dubious circumstances: (a) Officer Wallace (not in police uniform (tr. 12) attempted to identify himself as a Chicago police officer as his car drew alongside the car of the defendants by pulling his coat back to exhibit his star, and yelled "Police officers," and at-

[1]There was no warrant as to either defendant; Chiarelli was arrested immediately and Serritella was arrested about a week later.

[2]The defendants did not testify.

tempted to get out of his car, all in one continuous motion (tr. 12). (b) Officer Page (not in police uniform tr. 12) got out of his car with gun in hand, ran across the street towards Chiarelli, yelled "police officers" (tr. 50, 52).

5. The car in which defendants were riding had its windows closed as it was a cold January morning (tr. 21).

Under these circumstances any person would run though he be innocent; and defendants would reasonably and justifiably assume that it was an attempt on their lives from persons unknown. In most jurisdictions had the defendants been armed they would have been justified in killing the police officers under these circumstances, *People* v. *Scalisi*, 324 Ill. 131.

We also wish to particularly point out that counsel for the government stipulated that it would not alone rely upon the flight of Chiarelli as evidence of his guilt (tr. 27). We believe the Government realized the circumstances of flight did not provide the Government with sufficient evidence of guilt and we contend this statement on behalf of the Government (tr. 27) is an admission on the part of the Government.

We belive that evidence of flight is important because of the Government's position that the evidence of flight made the defendants guilty of the knowledge of the package which Chiarelli was carrying. We contend that under the above circumstances the evidence of flight cannot be construed against the defendants as evidence of guilt.

STATEMENT OF CHIARELLI.

We wish to emphasize to the Court the testimony of the two arresting officers[1] regarding Chiarelli's statement while lying wounded in the emergency room of Michael Reese Hospital.

Officer Page, one of the arresting officers testified Chiarelli told him he was given $5.00 for delivering the package (Tr. 48). Officer Wallace[2] the other arresting officer testified Chiarelli told him he was given $50.00 (tr. 48). (Officer Wallace admitted that there was a claim that he shot Chiarelli in the back seat of the police car (tr. 32).

THE FINGERPRINT EVIDENCE OF SERRITELLA.

As we have stated in our petition, the evidence as to Serritella's fingerprints is not valid in that the expert in the case at bar gave no opinion further than that he found a print on each of two envelopes out of five. The envelopes were empty when he examined them. He gave no opinion or circumstance to exclude the possibility that they were empty when touched by Serritella. Here again we must presume that the envelopes contained the drugs at the time Serritella first imprinted his prints upon the envelopes. We know from 31 C.J.S. Sec. 116 B, Page 727 and refer to the cases cited: "Inferences cannot be based on inferences."

As to the defendant Chiarelli—Chiarelli was not shown to have been present when the fingerprints were made nor is

---

[1]Two other officers who were not involved in the arrest testified Chiarelli stated he was given $50.00 (tr. 61, 64).

[2]We contend that Wallace's testimony may have been colored because of the suspicious shooting in which he was involved.

there any evidence from which to infer that they were made during the performance of a joint venture.

We wish to make one further point in that Officer Page (tr. 48), Officer Magan (tr. 49), Officer Wallace (tr. 16, 17, 18), Officer Blazek (tr. 61), Agent Newman (tr. 79), Agent Fonner (tr. 78) and Mr. Sheehan (tr. 81) all handled the 5 envelopes which were supposed to have contained the drug in question, yet Mr. Sheehan testified that there was only one print of Serritella's left little finger on each of the 2 envelopes which were supposed to contain the prints (tr. 92, 93, 94, 95, 96); one would wonder how so many people could handle five envelopes and yet have only the prints of Serritella on them.

We pray that a rehearing be granted in order that we may have further opportunity to support our claim here under the law and facts as shown by the record.

Respectfully submitted,

WM. SCOTT STEWART and
LOUIS J. GILIBERTO,
Counsel for Petitioners.

Wm. Scott Stewart and Louis J. Giliberto hereby certify that this petition is restricted to substantial matters available to petitioners but not previously presented.

WM. SCOTT STEWART,

LOUIS J. GILIBERTO,
Counsel for Petitioners.